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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

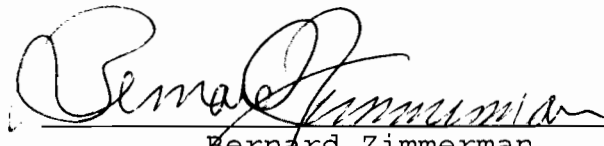
ANDREA GORDON,
Plaintiffs,
v.
THE BAY AREA AIR QUALITY
MANAGEMENT DISTRICT,
Defendants.

No. C08-3630 BZ

FINAL JURY INSTRUCTIONS

The Court proposes to give the following Jury
Instructions to the jury at the end of the case.

Dated: May 13, 2010


Bernard Zimmerman
United States Magistrate Judge

Members of the jury, now that you have heard all the evidence, it is my duty to instruct you on the law which applies to this case. A copy of these instructions will be available in the jury room for you to consult if you find it necessary.

You must not infer from these instructions or from anything I may say or do as indicating that I have an opinion regarding the evidence or what your verdict should be.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all important.

The evidence you are to consider in deciding what the facts are consists of:

1. the sworn testimony of any witness;
2. the exhibits which were received into evidence; and
3. any facts to which the lawyers have agreed

The exhibits will be brought into the jury room. Do not concern yourselves with the fact that they are not consecutively numbered and may have large gaps between numbers. This results from numbering conventions that have been adopted, from rulings I have made excluding exhibits and from the fact that lawyers often prepare exhibits which they decide not to introduce into evidence.

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

(1) Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they say in their closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

(2) Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

(3) Testimony that was excluded or stricken, or that you were instructed to disregard, is not evidence and must not be considered. In addition sometimes testimony and exhibits were received only for a limited purpose; when I gave a limiting instruction, you must follow it.

(4) Anything you may have seen or heard when the court was not in

session is not evidence. You are to decide the case solely on the evidence received at the trial.

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what the witness personally saw or heard or did. For example, the witness testifies "I saw Joe break the glass." Circumstantial evidence is proof of one or more facts from which you could find another fact. For example, the witness testifies "I saw Joe holding the glass before I left the room. No one else was in it. When I returned, the broken glass was lying at Joe's feet." You could find that Joe had broken the glass in either example. You must consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it. Proof of a fact does not necessarily depend on the number of witnesses who testify about it.

In considering the testimony of any witness, you may take into account:

- (1) the opportunity and ability of the witness to see or hear or know the things testified to;
- (2) the witness's memory;
- (3) the witness's manner while testifying;
- (4) the witness's interest in the outcome of the case and any bias or prejudice;
- (5) whether other evidence contradicted the witness's testimony;
- (6) the reasonableness of the witness's testimony in light of all the evidence; and
- (7) any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testified about it.

When a party has the burden of proof on any claim or affirmative defense by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim or affirmative defense is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it. On any claim, if you find that each of the elements on which the plaintiffs have the burden of proof has been proved, your verdict should be for the plaintiffs on that claim, unless you also find that the defendant has proved an affirmative defense to that claim, in which event your verdict should be for the defendant on that claim.

FAIR TREATMENT

All parties are equal before the law and a governmental agency is entitled to the same fair and conscientious consideration by you as any party.

RACE AND GENDER DISCRIMINATION - Title VII AND §1981

Plaintiff brought separate claims of employment discrimination and retaliation against Defendant under two federal laws, Title VII of the 1964 Civil Rights Act and the Civil Rights Act of 1866, *as amended* (sometimes called §1981). Both statutes prohibit discrimination on the basis of race. Title VII also prohibits discrimination on the basis of sex or gender.

GENDER AND/OR RACE DISCRIMINATION - PROMOTION

Plaintiff claims that her sex and/or race was a motivating factor for Defendant's decisions not to promote her on three occasions.

Defendant denies that Plaintiff's sex and/or race was a motivating factor for its decisions not to promote her. Defendant claims its decisions were based upon lawful, nondiscriminatory reasons.

To prove her discrimination claims, Plaintiff has the burden of proving each of the following elements by a preponderance of the evidence:

1. She was not promoted to the position of Supervising Environmental Planner in June 2006; or Principal Environmental Planner in February 2007; or Supervising Environmental Planner in August 2007;
2. She was qualified for the position; and
3. Her sex and/or race was a motivating factor in Defendant's decisions not to promote her . With respect to the positions of Supervising Environmental Planner in June 2006, and Principal Environmental Planner in February 2007, you may find for Plaintiff on those claims only if you find that Plaintiff's race was a motivating factor in Defendant's decision.

If you find that Plaintiff failed to prove all these elements as to any of the positions for which she applied, your verdict should be for the Defendant on that claim.

If the plaintiff has proved all of these elements for any claim, the plaintiff is entitled to your verdict on that claim, even if you find that the Defendant's conduct was also motivated by a lawful reason. If, however, the Defendant proves by a preponderance of the evidence that the Defendant would have made the same decision even if the plaintiff's race and/or sex had played no role in the employment decision, your verdict should be for the Defendant on that claim.

MOTIVATING FACTOR

The phrase "motivating factor" means something that moved Defendant toward its decision and induced action. Even though other matters may have contributed to the taking of the action, Defendant is still liable for discrimination if Plaintiff's sex or race was one of the factors.

CIVIL RIGHTS—TITLE VII—RETALIATION—ELEMENTS AND BURDEN OF PROOF

The Plaintiff seeks damages against the Defendant for retaliation. The Plaintiff has the burden of proving each of the following elements by a preponderance of the evidence:

1. the Plaintiff engaged in an activity protected under federal law, that is complaining to Defendant and to the EEOC about Defendant's alleged race or sex discrimination.

2. the employer subjected the Plaintiff to an adverse employment action; and

3. the protected activity was a motivating factor in the adverse employment action.

If the Plaintiff has proved all three of these elements, the Plaintiff is entitled to your verdict, unless the Defendant has proved by a preponderance of the evidence that it would have taken the same action even if the Plaintiff had not engaged in a protected activity. In that event, the Defendant is entitled to your verdict, even if the Plaintiff has met her burden of proof on all three of the above elements. If you find that the

Plaintiff has failed to prove any of these elements, your verdict should be for the Defendant.

ADVERSE EMPLOYMENT ACTION - IN RETALIATION CASES

An action is an adverse employment action if a reasonable employee would have found the action materially adverse, which means it might have dissuaded a reasonable employee from making or supporting a charge of discrimination.

LIABILITY OF CORPORATIONS-SCOPE OF AUTHORITY NOT IN ISSUE

Under the law, a governmental agency is considered to be a person. It can only act through its employees, agents, directors, or officers. Under Title VII, the Defendant is responsible for the acts of its employees, agents, directors, and officers performed within the scope of authority. Under §1981, the Defendant is only liable if the acts that deprived plaintiff of her civil rights were committed by someone with final authority to make employment decisions for the District.

AGENT AND PRINCIPAL—DEFINITION

An agent is a person who performs services for another person under an express or implied agreement and who is subject to the other's control or right to control the manner and means of performing the services. The other person is called a principal.

AGENT—SCOPE OF AUTHORITY DEFINED

An agent is acting within the scope of authority if the agent is engaged in the performance of duties which were expressly or impliedly assigned to the agent by the principal.

**ACT OF AGENT IS ACT OF PRINCIPAL- SCOPE OF AUTHORITY NOT
IN ISSUE**

Any act or omission of an agent within the scope of authority is the act or omission of the principal.

1981 INSTRUCTION

In addition to Title VII, Plaintiff has claims based upon the Civil Rights Act of 1866, generally referred to in these instructions as §1981. § 1981 also prohibits discrimination and retaliation on the basis of race, but does not apply to claims of sex discrimination. The elements of a § 1981 claim for failure to promote or retaliation are the same as under Title VII, with one exception.

**Local Public Entity Liability—Proof of
Municipal or County Policy**

In order for Plaintiff to prevail on her § 1981 claim against the Defendant, Plaintiff must prove by a preponderance of the evidence that the actions or conduct that deprived her of her civil rights were performed by someone with final policymaking authority. The Court has determined that Jack Broadbent is Defendant's final policymaker for employment decisions such as hiring. If you find that the acts of Jack Broadbent deprived Plaintiff of her civil rights, then the Defendant is liable for such deprivation.

NO SPECIFIC INTENT REQUIREMENT

It is not necessary to find that Defendant had a specific intent to deprive Plaintiff of her civil rights in order to find in favor of Plaintiff. Plaintiff is entitled to relief if intentional conduct by Defendant resulted in the violation of her rights.

INTENTIONAL ACTS DEFINED

An act is intentional if it is done knowingly - that is, if it is done voluntarily and deliberately and not because of mistake, accident, neglect or other reason.

COMPENSATORY DAMAGES

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered.

If you find for the Plaintiff on the Plaintiff's race discrimination, sex discrimination, or retaliation claims, you must determine the Plaintiff's damages. The Plaintiff has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate the Plaintiff for any injury you find was caused by the Defendant. You should consider the following:

- The nature and extent of the injuries;
- The mental emotional pain and suffering experienced and which with reasonable probability will be experienced in the future;

Your award must be based upon evidence and not upon speculation, guesswork or conjecture.

If you find for the Plaintiff, the Court will determine whether Plaintiff is entitled to lost wages or reinstatement. Accordingly, do not take into account any past or future lost wages in your calculation of damages.

CAUSATION: SUBSTANTIAL FACTOR

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.

MITIGATION

The Plaintiff has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages.

The Defendant has the burden of proving by a preponderance of the evidence:

1. that the Plaintiff failed to use reasonable efforts to mitigate damages; and
2. the amount by which damages would have been mitigated.

EMOTIONAL DISTRESS - DEFINED

The term “emotional distress” means mental distress, mental suffering or mental anguish. It includes all highly unpleasant mental reactions, such as fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation and indignity, as well as physical pain.

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